

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

BABCOCK AND WILCOX NUCLEAR)	
OPERATIONS GROUP, INC.)	CASE NO. 08-CA-138022
)	
and)	
)	
INTERNATIONAL BROTHERHOOD)	
OF BOILERMAKERS, IRON)	<u>RESPONDENT'S BRIEF IN RESPONSE</u>
SHIPBUILDERS, BLACKSMITHS,)	<u>TO BOARD'S MARCH 12, 2015 NOTICE</u>
FORGERS AND HELPERS,)	<u>TO SHOW CAUSE</u>
LOCAL #900)	

Pursuant to NLRB Rules and Regulations Section 102.24, the Babcock & Wilcox Nuclear Operations Group, Inc. ("B&W") respectfully submits this Brief in Response to the Board's March 12, 2015 Notice to Show Cause why B&W's Motion to Dismiss the Complaint and Notice of Hearing ("Motion to Dismiss" or "Motion") should not be granted. Indeed, the Motion *should be granted* and the case should be deferred to the contractual grievance-arbitration procedure ("Grievance Procedure") between B&W and the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, Local #900 ("Union").

I. INTRODUCTION.

The Motion does not ask the Board to deny any party its "day in court." Nor does it ask the Board to create new law or to deviate from its governing precepts in any way. Rather, this case involves a stable collective-bargaining relationship, a reliable grievance-arbitration procedure, and a single allegation of routine discipline based upon a discussion between a single employee and his supervisor. As such, the Motion to Dismiss simply asks the Board: (1) to mechanically apply controlling pre-arbitral

precedent, which dictates that cases like this are “eminently well suited for deferral,”¹ and accordingly, (2) to “hold[] the parties to their bargain by directing them to avoid substituting the Board's processes for their own mutually agreed-upon method for dispute resolution.”²

For these reasons, as summarized below, and as explained more fully in the Motion and in B&W’s Reply Brief in Support of the Motion (“Reply”), the Complaint should be dismissed and the case deferred, in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971).

II. RELEVANT PROCEDURAL BACKGROUND.

This case arises from an October 3, 2014 unfair labor practice charge filed with Region 8 by the Union in Case 08-CA-138022 (“Charge”).³

On November 3, 2014, B&W requested deferral of the Charge to the Grievance Procedure and affirmed its willingness to waive all timeliness objections. See Motion, Exhibit (“Ex.”) 3. The Regional Director denied B&W’s deferral request, however, stating that the Charge involves the discipline of a Union steward for his protected concerted conduct, and that the Board does not defer those types of matters. *Id.* at Ex. 4.

On December 31, 2014, the Region issued a Complaint based on the Charge. It claims that B&W violated §§ 8(a)(1) and (3) of the National Labor Relations Act by allegedly disciplining Larry Stauffer for his union and/or protected concerted activities when, following a discussion between Stauffer and his supervisor about his overtime, it

¹ *United Technologies*, 267 NLRB 557, 560 (1984).

² *Id.* at 558.

³ The Charge was amended on December 19, 2014 to accurately reflect the identities of the parties.

issued him a written warning letter for his abusive conduct during that discussion. Complaint ¶¶ 5, 7(b), 7(c), 7(d).

On January 14, 2015, B&W filed, along with an answer to the Complaint, the Motion to Dismiss. Subsequently, the General Counsel filed a Reply in Opposition to the Motion (“Opposition”), which conceded that five of the six *Collyer* deferral factors have been met and argued—as the sole basis for opposing the Motion—that this single letter constitutes “hostility to employees’ exercise of Section 7 rights.” Opp. at 5; see *a/so* Reply at 4 (cataloguing the General Counsel’s various conflicting descriptions of the basis for its Opposition). B&W responded to the Opposition with its February 5, 2015 Reply.

On March 12, 2015, the Board issued its Order Transferring Proceeding to the Board and Notice to Show Cause why B&W’s Motion should not be granted.

III. ARGUMENT.

A. Legal Standard.

In response to a notice to show cause order, the party opposing the motion at issue must demonstrate a “genuine issue for hearing.” NLRB Rules and Regulations Section 102.24. Here, there are no genuine issues.

The deferral issue in this matter is governed by the Board’s once-long-established six-factor standard set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). It is not governed by the Board’s new pre-arbitral deferral standard, which it recently announced in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, 2014 NLRB LEXIS 964 at *59 (Dec. 15, 2014). Indeed, that standard applies to pending cases, like this one, only if the parties’ contract “[explicitly] authorizes [the] arbitrator[] to

decide unfair labor practice issues”. *Id.* at *64; see also Reply at fn.3. Here, the contract between B&W and the Union contains no such authorization, and the General Counsel does not contend otherwise. See Opp., *passim*. In fact, the General Counsel specifically concedes that the *Collyer* standard applies to this case. *Id.* at 4. Moreover, all six *Collyer* deferral requirements are clearly met. Accordingly, there are no genuine issues and deferral is appropriate.

B. Deferral is Appropriate.

1. All Six *Collyer* Deferral Requirements Are Met.

The following facts are neither disputed nor rebutted by the General Counsel. B&W and the Union have a long and stable collective-bargaining relationship, one that has not produced a single unfair labor practice allegation in at least the past six years. See Motion at 6-7. In this same time, moreover, the parties have processed over 160 grievances through the Grievance Procedure. See Reply at 6. And many of those grievances have involved the same kind of non-discharge discipline alleged to be at issue here: a single disciplinary warning, issued to an employee for his abusive conduct during an isolated discussion about his overtime request being denied. See Motion at 6-7.⁴ Moreover, B&W has expressed its willingness to waive procedural objections to processing this dispute under the Grievance Procedure. *Id.* Accordingly, even construing the facts as favorably to the General Counsel as the pleadings allow,⁵ all six *Collyer* deferral requirements are clearly met.

⁴ See also Motion, Exhibit 2 (Declaration of William F. Gribbon). B&W stresses that the parties routinely process non-discharge discipline through their broad contractual grievance-arbitration procedure, and that this point is completely un rebutted.

⁵ *Accord Local 917 International Brotherhood of Teamsters (Peerless Importers, Inc.)*, 345 NLRB 1010, fn. 2 (2005) (noting that in deciding a motion to dismiss, the Board will "accept the

2. The General Counsel's Opposition is Groundless.

In the Opposition, the General Counsel essentially ignores B&W's *Collyer* analysis, instead advancing arguments that were explicitly rejected by the Board in *United Technologies* and its progeny. As in *United Technologies*, the General Counsel here opposes deferral solely because the allegations involve interference with an employee/Union steward's Section 7 rights. See Opp. at 5; Reply at 4. The *United Technologies* Board explicitly rejected this argument, however,⁶ and the Board continued to do the same thereafter. Reply at 4-7.⁷ For this reason, it is not surprising that the General Counsel does not cite a single applicable case to support its position, let alone a case decided post-*United Technologies*. *Id.* at 7. In short, the General Counsel's argument is groundless.

IV. CONCLUSION.

For each and all of the above reasons, B&W submits that all six *Collyer* deferral requirements are met and, therefore, respectfully requests that its Motion to Dismiss be granted and that the case be deferred to the Grievance Procedure.

complaint's factual allegations as true and construe the complaint in the light most favorable to the General Counsel"). Indeed, while B&W denies many of the Complaint allegations, for purposes of this Motion only, it assumes that *all* of these allegations are true.

⁶ 268 NLRB at 558.

⁷ See also *United Beef Co.*, 272 NLRB 66, 68 (1984) (deferring allegations that employer "harassed and discharged [the employee] for engaging in union activity").

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief in Response to Board's March 12, 2015 Notice to Show Cause was served upon the following, via e-mail, this 26th day of March, 2015:

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